The Historic Origins of the U.S. Mining Laws and Proposals for Change

A Home Study Course for Continuing Professional Development

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Foreword

The American Association of Professional Landmen (AAPL) is committed to serving the professional development needs of the land professional. The demands on the land professional’s time and financial resources continue to grow. In our continuing effort to address these demands, the AAPL is proud to introduce its seventh home study course, The Historic Origins of the U.S. Mining Laws and Proposals for Change. This home study course will benefit all land professionals by giving them an understanding of the evolution of federal mining legislation and regulation.

Registered Land Professionals (RLPs) and Certified Professional Landmen (CPLs) will earn four continuing education credits upon the successful completion of the requirements found in the back of this home study course within the allotted time frame.

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Robin A. Forte’, CPL
Director of Education
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Biography

John C. Lacy is a mining lawyer and partner with DeConcini McDonald Yetwin & Lacy in Tucson, Arizona. Mr. Lacy grew up in the mining camps of Peru and has lived in Tucson since 1955 and graduated from the University of Arizona (Bachelors in journalism in 1964 and Juris Doctorate in 1967). He has written a wide variety of professional legal and historical publications on subjects including state land titles and management responsibilities, contractual vehicles for mineral development, mineral royalties and historical evolution of mineral law. He has participated in the litigation of several landmark public land, mining and water rights cases and has been a contributor to lobbying efforts at both the national and state levels on matters of mineral policy. Mr. Lacy has also been a consultant to the Republic of Bolivia for the revision of that country’s mining code and continues to use his background in mineral law history to evaluate trends in mineral law development in the United States and Latin America.

Mr. Lacy is president of the Society of Mining Law Antiquarians and also serves as the editor of its newsletter, Dips, Angles and Spurs, a member of SME, a former president of the Rocky Mountain Mineral Law Foundation, a former president of the Board of Directors of the Southern Arizona chapter of the Arizona Historical Society, and has taught a course in mining and public land law since 1976 as an Adjunct Professor at both the College of Mines and Engineering and the College of Law.
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By John C. Lacy

Gold may be dug on government land, without charge or hinderance.
— By command of Richard B. Mason, Colonel, 2d Dragoons, Military Governor of California, July 25, 1848.

The message of this order, by the only legal authority in what was only six months earlier the Department of California in the Republic of Mexico, was clear: The meager 100-man force of the United States Army would not even try to stem the flood of adventurers streaming into the goldfields of California. California at the time was the fulfillment of the “Manifest Destiny” of the United States to colonize the breadth of the continent, and the unexpected discovery of gold took place a scant nine days before the treaty of peace between the United States and Mexico was signed on February 2, 1848.

Colonel Mason had, in some respects, created his own problem. On February 12, 1848, when the gold discovery was only rumor, he directed that “From and after this date, the Mexican laws and customs now prevailing in California, relative to the denouncement [i.e., making a formal claim] of mines, are hereby abolished.” GREGORY YALE, LEGAL TITLES TO MINING CLAIMS & WATER RIGHTS IN CALIFORNIA UNDER THE MINING LAW OF CONGRESS OF JULY 1856, 17 (1867). Then, with no direction as to what to do in the interim, a legal vacuum was created that the miners of California were more than eager to fill by writing their own rules.

This invitation to individual enterprise amplified every legend of riches coming out of California (and some other places along the new border with Mexico) and the inaction of the federal government created a political climate that culminated with the self-governing popular democratic institution known as the Mining District whose legal charter was represented by “mining district regulations.” Although the institution itself has been romanticized to the point of absurdity, from our historical perspective, the political correctness of the institution at the time clearly provided the legislative momentum that resulted in the present form of the mining laws of the United States. The politics of the time, however, masked the greater truth that the rules adopted by these miners had already been shaped by at least one millennium of experience. This article traces the roots of this experience to California, through the enactment of the federal mining law, and looks at the proposals for change in light of this history.
Regal Ownership and the Free Miner

Mineral wealth and mining itself, from earliest history, has been a function of royalty patrimony. The reason for this is simple: Metals were used for legal tender, to adorn the ruling class, and to equip armed forces. The rules for minerals exploitation were thus tightly controlled by the sovereign and frequently miners only skimmed the cream of the ore deposits exposed at the surface. Exploration and systematic development did not exist as metallic wealth was only a crop to be gathered and not a mineral occurrence that called for a systematic search. Because of the nature of this regal ownership, little concern was ever expressed over the boundaries of such mineral deposits or for that matter, the welfare of the miners working the deposits who were often convicts or slaves.

Outside the “civilized” world, however, mining and metallurgy were recognized as rare skills and tribes with this knowledge slowly came to fill the popular demands for metals and metallic products by Bronze Age consumers. The catalysts of this circumstance were the merchandisers of the Eastern Mediterranean, the Phoenicians from their base in northern Canaan, who stimulated a far-flung trading network and created market outlets that brought a system of trade with peoples outside of what was then considered civilization. The mineral-rich areas of the Mediterranean, Thrace, Attica, the Greek Islands, Cyprus, Carthage and Southern Spain were visited or colonized by the Phoenicians in their efforts to obtain sources of metals for trade. This fostered the idea for private production of metals for commerce rather than for the traditional royal prerogatives.

Gradually, two distinct legal structures developed based on the means by which a mineral resource was acquired. If the resource had been acquired by conquest, the conqueror would force the subjugated people to work the existing mines within the newly acquired territory. The laws related to these existing mines were therefore first concerned with ensuring that the monarch got his or her due from production from this royal interest. On the other hand, where mineral production was dependent on the ingenuity and talents of individual miners to find new mines and to place these mines in production, the legal system typically afforded miners special privileges. These privileges included both the right to move freely without being tied to the land, together with rights to acquire real estate and freedom from many other obligations normally owed to a monarch. This concept of the “free miner” and the development of laws and customs associated with this concept can be found in the earliest ages of metalworking.

Modern mineral laws represent a merger of these concepts and the political winds have moved individual codifications back and forth between these two poles. Perhaps significantly, the first known example of such a merger can be found in the first experiment with democratic government: the Greek City States. The known materials are associated almost entirely with the mines of Attica, a plain on the Aegean Sea southeast of Athens, and a substantial silver deposit known as the “Laurion Mines” where production was first recorded in 800 B.C. This mine was a source of the wealth of the Athenian state and, Prior to the Persian Wars, generated
royalties for the citizens of Athens. In 483 B.C., Themistocles persuaded the
government that these revenues should be directed toward equipping the Athenian
navy, which proved to be the decisive factor in the defeat of the Persians at Salamia
in 480 B.C.

The evidence of the mineral laws during this time showed that although the
mines were the property of the state, prospecting was encouraged and the
discoverer of a new mineral deposit was richly rewarded. The prospector, however,
was required to inform public officers of any new find and to register the mine. The
registration process followed the now-common tradition of naming mines and, once
discovered, the mine was thereafter leased by a board of magistrates who fixed the
specific boundaries and set the terms of the lease. The leases were awarded to
companies organized to work one or more shafts, and members of the companies
were required to be citizens of Athens. Upon attaining a lease, a company was
required to pay a one-talent bonus (an Attic talent was equal to 838 troy ounces) and
a royalty or tribute of one twenty-fourth of production in silver bullion. Although the
length of the leases is not clearly evident, substantial evidence suggests that leases
were for a term of seven to ten years but subject to various forms of renewal. Given
the public nature of ownership of the Athenian mines, any actions alleging damages
were brought in the form of an assessment and the matter was considered in a
court. Concerns related to “robbing the pillars” (taking ore from columns left for the
support of existing workings) were treated very harshly.

The Roman Empire, after first following a traditional regalitarian regime of
exploiting mines as the booty of war by the highest bidder using slave labor, began a
system of direct exploitation by the state beginning with the reign of Tiberius (rules
A.D. 14-37). By the time of Hadrian (ruled A.D. 117-138), Rome had adopted a
structured feudal system in its territories giving substantial local control and freedom
to the miners. The best known example is in the copper and silver mining district of
Vipasca in South Portugal near Aljustrel. Within this district, a director of mines
leased properties to either individuals or associations. The lessees were then
required to sink five shafts into the mineralized ground and could not thereafter
cease work more than ten consecutive days. Later, during the rule of Valentinian I
(ruled A.D. 365-375), and as the Roman Empire fell into disarray, private adventures
were granted permission to prospect in exchange for portion of the subsequent
production.

The concept of the free miner and the development of a private mineral law
progressed hand-in-hand with mining technology and was spread predominantly by
the Scythian tribes who, beginning in their ancestral lands north of the Black Sea,
disseminated their mining expertise and legal concepts related to mining throughout
Europe and into the British Isles. These tribes became known as the Celts and are
the common ancestors of the miners in both England and Germany. The Celts were
likely the source of the adoption of some of their views in Roman territorial mining
law as a result of invasions into the northern frontier of then Roman-dominated
areas.
As a structured civilization emerged in western Europe, new trade practices in the tenth century created private wealth. In this new climate of artistic expression and technological gain, the miners, in stark contrast to the agrarian serfs, were free to migrate to wherever their knowledge and expertise was required. Thus, ruling princes with potential mineral wealth would create a climate to attract the needed expertise, usually in the form of treaties or other decrees. The most widely known examples are the mining treaties between Albert III, the Bishop of Trent, and immigrants from Germany beginning in 1185. D. HAGERMANN & K. LUDWIG, EUROPÄISCHES MONTANWESEN IM HOCHMITTELALTER, DAS TRIENTER BERGRECHT 1185-1214 (1986). By these treaties, the prospector was awarded one area of the discovery, but then the areas immediately adjacent to this land were parceled out to individual office holders within the ruling class and the remaining portions were available to private miners. In the case of the 1185 treaty, a tribute was fixed according to the number of miners working the deposit together with a charge for the local workers. Once the payments were made, the profits of the mine could be retained by the operators so long as work was maintained and not interrupted for more than fourteen days.

English Memorialization of the Ancient Rights of the Miners

At this same time in England, two distinct legal institutions emerged. The first, in the tin mining regions of Cornwall and Devonshire, was recognized by the English crown to be controlled by chartered corporations called “stannaries.” The grassroots power of these miners was first evident in 1201, fourteen years before the Magna Carta, when John I granted the first charter of the stannaries confirming the “ancient right” of the miners of Cornwall and Devonshire of free right of entry on unoccupied lands. GEORGE R. LEWIS, THE STANNARIES, A STUDY OF THE MEDIEVAL TIN MINERS OF CORNWALL AND DEVON 239-40 (D. Bradford Barton Ltd. 1965, reprint of 1908 publication). The charters gave miners legislative power exercised through convocations in matters respecting mining, smelting and delivery of tin. The price of this practical self-government was a requirement to pay a royalty or tithe between one-eighth or one-ninth of the tin produced and paid to the crown. Additionally, where the land had been enclosed by a private owner, the “tinner” was required to pay a toll to the freeholder for damages to the surface.

A separate protocol existed for the lead mines within the High Peak of Derbyshire that more closely paralleled the practices of Saxony. The major difference between the two sets of rules was that in Derbyshire individual rights were dominant as opposed to the stannary system of government. The right of entry on common and private lands was parallel to the Cornish customs but the administration of the law was controlled through the Barmote courts. These rights were first memorialized as a result of an inquisition ordered by Edward I in 1288 where it was reported to the king that the procedure “from time immemorial” had been to allow the discoverer a double-sized claim which rights included the right to the vein itself, even when it extended beyond its surface boundaries. The discoverer was entitled to two claims on the discovery, and the tribute paid to the king or his lessee, in return for this right, was a third claim plus a royalty of a one-thirteenth
share of production (commonly called the “thirteenth dish”) from the first two claims.

Spanish Colonial Laws

As the Spanish kingdoms developed out of the ruins of the Roman empire, the first private rights to minerals were defined by the so-called Alcalá de Henares promulgated in 1348 by Alfonso the Just (Alfonso XI) of Castile and Leon and a decree of Juan I of Aragon in 1387. JOHN A. ROCKWELL, A COMPILATION OF SPANISH AND MEXICAN LAW IN RELATIONSHIP TO MINES AND TITLES TO REAL ESTATE 112-13 (1851). These laws proclaimed that all minerals belonged to the Crown but could be worked under a special license. The opportunities of the New World substantially changed the picture and, in 1526, spurred by discoveries at Taxco and Jalisco in New Spain, the Crown permitted local governments to grant the permission required to exploit mineral deposits. Based on this authority, don Antonio de Mendoza, New Spain’s first viceroy, issued a comprehensive mining code in 1550 adopting Saxon and English (i.e., Celtic) concepts of discovery, self-initiation of rights, and maintenance work required to maintain claims. The popular concepts of Viceroy Mendoza’s code were eventually absorbed into law when on August 22, 1584, Philip II promulgated the Ordenanzas del Nuevo Cuaderno (referred to as the “new ordinances”), which was the first comprehensive mining code applicable to most of the Spanish Empire. The new ordinances contained a remarkably broad grant of rights that granted to the discoverer the right to work mines as

Their own possession and property…observing both in regard to what they have to pay us [the Crown] by way of duty, and all other respects, the regulations and arrangements, ordered by this edict…

Ordenanzas del Nuevo Cuaderno (codified as Law 9, Title 13, Book 6, RECOPILACIÓN DE LAS LEYES DE ESTOS REYNOS (DE CASTILLA) (1640). This right has been characterized as “direct and beneficial grant of property; and is to be regarded as a qualified gift.”

Under the new ordinances, after making a discovery, a miner had twenty days within which to register the find with a mining justice, or in his absence, the local alcalde. The size of the discovery claim was 160 varas by 80 varas (a Castillian vara is approximately 32 inches) and could be situated either along or across the vein. The discoverer was not limited in the number of claims that could be staked on the same lode, but all subsequent claimants after an initial discovery were limited to two claims of 120 varas by 60 varas, each of which had to have three claims between them. Claims were required to be perfected through the sinking of a trial pit three estados deep (approximately fourteen feet) within three months of the original date of registration. Very clear work obligations also continued to be imposed by the new ordinances, which required the owners of a mine to keep four people working at
all times. If the work was not performed for a four-month continuous period, the mine would be forfeited. In such a case, the owner would be required to file a new registration, but the mine also became subject to denunciation (that is, initiation of adverse rights) by third parties.

The royalty rate, although colloquially referred to as the quinto or “the King’ fifth,” was, in the case of silver, based on a sliding scale depending on the recovery rate from the ore per quintal (101.45 pounds) of mercury consumed in the amalgamation process of recovering silver. For example, if the recovery was twelve ounces or less, the royalty rate was 10 percent; from twelve to thirty-two ounces, 20 percent; from thirty-two to forty-eight ounces, 25 percent; and more than forty-eight ounces, 50 percent. Separate provisions required a royalty of one-thirtieth for copper, one-tenth for antimony and one-half for gold. It seems clear that this royalty structure was premised upon the use of the “patio process” for precious metals extraction using mercury, which was invented in Mexico in 1554 by Bartolome de Medina. The royalty varied considerably in subsequent years by both edict and administrative practice and normally ranged from one-eighth to one-half.

The new ordinances were law until 1783 when Charles II promulgated the famous Ordenanzas de Minera. The location procedures established in 1783 were not dramatically different from the 1584 new ordinances although the provisions were refined significantly. The basic grant to the miners was stated as follows:

> Without separating them [mineral rights] from my royal patrimony, I grant them, to my subjects in property and possession, in such manner that they may sell, exchange, … or in any manner, dispose of all their property in them upon the terms of which they themselves possess it …

Reales Ordenanzas para la Dirección, Régimen i Gobierno del Importante Cuerpo de la Minería de Nueva-España, i de su Real Tribunal General, DE ORDEN DE SU MAGESTAD, tit.5, art.2 (1783).

The grant required adherence to two conditions: royalty had to be paid and operations had to be conducted in accordance with the provisions of the ordinances. Any default was considered a forfeiture and subjected the mine to a new grant to any person making a denouncement. The registration process required the locator to first present a statement of the claim (taken up in 100 vara squares) to the territorial deputation, then post a notice on the door of the local church. Within the following ninety days, the locator had the formidable task of sinking a shaft on the claim measuring one and a half varas in diameter and ten varas deep. When the vein was ascertained by this process, one of the district deputies was required to visit the site accompanied by official witnesses to determine the physical nature of the vein. At the time of the inspection, the claim was measured and its boundaries marked by the locator.

In many respects the tenure of Spanish colonial mining codes was similar to an unpatented mining claim under the General Mining Law of the United States.
The major difference was in the stringent requirement to keep the mine in actual continuous operation. This requirement probably represented the fatal flaw within the law because it had no flexibility for economic or practical problems and resulted in either the mines being “highgraded” or bankrupting the miners. The new discovery in California thus provided a grand new opportunity.

The Birth of the Mining District Regulations

As the wave of human migration swept over the California goldfields, the federal government was slow to act. In Washington, Thomas Hart Benton, United States senator from Missouri and a fervent supporter of western expansion (and father-in-law of John C. Fremont who may have had an influence), began the debate for a mining law in Congress on January 15, 1849, with a speech criticizing the Treasury Department’s effort to sell mineral lands in two-acre parcels. He viewed the gold rush as a transitory event:

As washings, [the goldfields] are brief and transient, exhausted in a few months or years. The gold in these washings, is a temporary crop — as temporary as a crop of grass, or a harvest of acorns: and who would think of selling the fee simple where only one crop was to be gathered? A mine is one thing — a wash is another.

CONG. GLOBE, 30th Cong., 2d Sess. 254-59 (1849). Senator Benton went on to suggest that the miners did not want a fee simple title to the land but simply a permit to hunt and the protection of the discovery for the relatively short period required to exhaust the deposit.

As it turned out, Senator Benton’s views represented the precise attitude taken by the United States Congress, except that Congress found that no permits were needed because the miners effectively took care of the matter themselves by improvising their own laws. In essence, the miners didn’t care who actually “owned” the property as long as no one interfered. They simply took possession based on laws they themselves promulgated from their previous experiences under the miners’ laws and practices in England, Germany and Mexico. These practices were in the form of “mining district regulations,” consensual bylaws of groups of individual miners. These mining district regulations reflected the accumulated wisdom and customs of miners in a classic laissez faire environment and show the influence of the laws and customs of the Stannary Convocations of the tin miners of Cornwall, the High Peak District of Derbyshire, Saxony, the Spanish Colonial ordinances of the viceroyalties of New Spain, and Peru. The regulations also reflected some of the contemporary public land practices in the United States, most notably, the unofficial preemption “claimants unions” used in the 1830s by homesteaders in Wisconsin and Iowa. The common thread within all of these customs and practices was a tradition of reward and tenure based on a discovery of value. The mining district regulations picked up this thread with the establishment of the general principle characterized as
... the right of property in mines is made to depend upon discovery and development; that is, discovery is made the source of title, and development, or working, the conditions of the continuance of that title. These two principles constitute the basis of all our local laws and regulations respecting mining rights,


The Passage of a Federal Mining Law

As Congress returned to the issue, however, the sentiment continued to be strong to sell all the mines, including the mines of California, to obtain revenue. The first such bill was introduced in both houses during the 39th Congress by Sen. John Sherman of Ohio and Rep. George W. Julian of Indiana. This initial proposal was strongly supported by the Secretary of the Treasury and drew the battle lines for the debate over the form of the mining law. The principal antagonists in this legislative battle turned out to be Representative Julian, the chair of the House Committee on Public Lands, and Sen. William Stewart of Nevada, himself a ‘49er and mining lawyer who made his fortune on the Comstock lode and was a member of the Senate Committee on Mines and Minerals.

Representative Julian was the champion of efforts to sell the mineral lands and introduced legislation to accomplish this end in both 1865 and 1866. The sales legislation was opposed by the western delegation led by Sen. John Conness of California and Senator Stewart. Senator Stewart’s plan on the other hand was to obtain formal recognition of the past practices of the miners.

As it turned out, the most significant event in passing a mining law took place in 1865 with the creation of committees on Mines and Mining in both the House and Senate. In April 1866, a bill was introduced by Senator Sherman, having apparently now changed his mind from his earlier insistence on sales legislation. Senator Sherman may have been influenced by his brother, William Tecumseh Sherman, who had been Colonel Mason’s aide d’camp in California during the gold rush and later became a prominent California banker before the Civil War hostilities erupted.

The Committee on Mines and Mining, by an amendment authored by Senator Stewart, amended Senator Sherman’s bill to open mineral lands to free exploitation and permit acquisition of fee simple title of lode mineral lands for a nominal amount. Senator Stewart’s argument in favor of the amended bill was that by providing secure mining titles, investments would be encouraged resulting in increased gold production. Because the United States’ principal asset to back up its debts was land, the increased production of gold would proportionately raise the value of land and thus the national debt would be proportionately reduced. The bill passed the Senate and upon its arrival in the House, Representative Julian had the bill referred to his Committee on Public Lands where he intended it to die.
The mining delegation, mounting a new offensive of legislative manipulation, discovered that a bill authorizing rights-of-way over public lands in California had been submitted to Representative Julian’s committee by mistake. The mining delegation had this mistake corrected and transferred the bill to the Committee on Mines and Mining. After the bill was reported out of committee and passed by the House, the Senate committee, by amendment, added the provisions of Senator Stewart’s bill that had been passed three weeks earlier. When the legislation came back to the House, it was referred back to the committee from which it came, that is, the House Committee on Mines and Mining, thereby avoiding Representative Julian’s committee. The bill sailed through the House with very little opposition although Representative Julian was heard to complain loudly of this “trickery”. Thus, the new lode mining law became law on July 26, 1866, under the rather deceiving title of “An Act Granting the Right-of-Way to Ditch and Canal Owners Over the Public Lands, and for Other Purposes.” 14 Stat. 252.

This is not to suggest that the 1866 mining law was the result of legislative maneuvering; the bill was fully debated and was clearly the will of Congress. The 1866 mining law was short, containing eleven sections, only four of which directly impacted the procedures for acquiring mineral title. In fact, the substance of the bill came directly from the lode mining regulations of the Grass Valley Mining District of Nevada County, California, adopted on December 20, 1852, and the Gold Mountain Mining District of Storey County, Nevada, adopted on March 4, 1860, both of which were shaped in some degree by Senator Stewart. By the Act, the mineral lands were declared to be open to exploration by all citizens of the United States and those who had declared their intentions to become citizens, subject both to regulations as may be prescribed by law and “local customs or rules of miners in the several mining districts” insofar as they were not in conflict with the laws of the United States. After any person or association of persons had expended $1,000 in actual labor and improvements on a claim, the claimant could obtain a patent for the vein contained within the claim together with the right “to follow such vein or lode, with its dips, angles and variations to any depth” even though it entered adjoining land. The patent was limited to the single vein for which it was granted and each locator was limited to 200 feet in length along the vein. The original discoverer, however, was entitled to an additional claim in recognition of the discovery. Individuals were prohibited from having more than one location on the same lode and not more than 3,000 feet could be taken in any one claim by any association of persons. Finally, the individual states or territories were given authority to provide rules for the working of mines within their borders, including easements and drainage, and local courts were given authority to determine contests of title prior to the patent issuance.

The 1866 law was recognized by everyone, including the miners, as being far from perfect with sentiments running all the way from those who still felt that the sale of the mines was the appropriate method of disposal to those who felt that the mining law was an infringement upon established rights. Among its significant flaws was that it applied to only vein-type deposits. (This was remedied in 1870 when placer deposits were added to the categories of minerals capable of being patented,
Act of July 9, 1870, 16 Stat. 217, and the patent issued by the government was only for the single vein within the claim (the extent of surface ground fixed by the patent was undetermined). The miners, however, recognizing that the new law was the product of their own rules, looked upon all attempts to enact a more complete code with distrust as they feared “that to open the subject again might imperil advantages already gained.” The core of the principles that the miners wished to retain were the “recognition of their mining laws, and the right of the discoverer of a mine to purchase the title from the government at a reasonable price.” These concerns still echo in the halls of Congress.

Congress had significant assistance from the Commissioner of Mineral Statistics, an agent of the Department of Treasury, in its considerations for modifications of the mining law. Some of the most insightful and, in light of the resulting legislation, persuasive comments came from Rossiter W. Raymond, who also had ties to the early California pioneers as he served as an aide d’camp to John C. Fremont during the Civil War. Raymond was a renowned mining engineer who would later become the editor of the American Journal of Mining and was the secretary of the American Institute of Mining Engineers from 1884 until 1911. In Raymond’s first report to Congress in 1869, he submitted a lengthy analysis of “the relation of governments to mining,” in which he presented in great detail the derivation of the mining law through Greek, Roman, German and English development and examined the modern codes of Europe and Colonial Spain. ROSSITER W. RAYMOND, MINERAL RESOURCES OF THE STATES AND TERRITORIES, H.R. EXEC. DOC. No. 54, 40th Cong., 3d Sess. (1869).

Raymond suggested that history taught the following lessons: royalty on precious metals is unfounded in nature and unwise in practice; the benefits derived by government from mines must be indirect and tax for revenue should not be laid on mining any more than agriculture; the country should establish a program of alienating the mines from the United States as soon as possible by uniform policy; the manner of conveying title should be regulated to avoid litigation and at the same time encourage mining, recognizing that it surrendering title to the patentee, the stimulus for production would be natural laws of supply and demand; extralateral rights enhanced the value of mining claims and thus encouraged exploration at depth; and finally, although history showed that mining flourishes best when the property and minerals are distinguished from the ownership of the soil, the best policy for the United States would be to sell the surface along with the mines to avoid conflicts. This vision culminated in passage of the General Mining Law by Congress on May 10, 1872, 17 Stat. 91.

While the new 1872 law did not change the basic principles of prior law, it was much more than a simple reenactment and combination of the Lode and Placer Acts and did significantly more than “oiling the machinery a little” as characterized by its principal author, Rep. A.A. Sargent of California. The first section of the law contained a small addition from prior law that would have a dramatic effect on the operation of the law in future years. This change was that instead of "mineral lands" being open to exploration and purchase, the law would apply to "valuable mineral deposits," thus establishing a qualitative basis for the validity of mining claims. The
law went on to provide for specific limits to both lode and placer mining claims, lode mining claims being limited to 1,500 feet along the vein and 300 feet on either side of the center line and granting the claimant the right to all veins having their uppermost part within the vertical boundaries of the claim. The Act then preserved the “extralateral” right of the owner of the apex or top of the vein to pursue the mineral along its “downward” course, and required the performance of $100 worth of labor on an annual basis — although nothing was placed in the code requiring any annual memorialization of this fact. The core of the miner’s concerns was preserved by the provisions permitting the issuance of patents for mining claims at $2.50 per acre for placer ground and $5.00 an acre for lodes. This was considered a reasonable price by the miners in 1872, although when viewed in the context of the standard price for agricultural lands at $1.25 an acre, it could not have been considered an insignificant amount.

**Proposals for Change**

From its enactment in 1872, the General Mining Law has never been considered perfect and it has been examined, criticized and modified on numerous occasions. The most significant studies of the law have included a report of the Public Lands Commission established by the Act of March 3, 1879, 20 Stat. 394; a report in 1921 by a committee appointed by the United States Bureau of Mines, 22 TRANSACTIONS OF THE MINING & METALLURGICAL SOCIETY OF AMERICA, Bulletin 204, 95-109 (July 1929); and the report of the Public Land Law Review Commission in 1970. A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION’S LAND 121-38 (1970). The first two of these reports can be characterized as attempts to fine tune the mining law by entities representing industry concerns and probably did not represent the views of the individual prospectors. The Public Land Law Review Commission reflected a more interdisciplinary approach and a variety of public and land users were represented on the commission. The commission did not, however, have any direct representation by individual prospectors, although there were clearly commission members who expressed the individual prospector’s views.

The Public Lands Commission of 1879 consisted of Gen. James A. Williamson, head of the General Land Office; Clarence King, famous for his California Survey in 1863-1866 and who in 1879 had been appointed director of the United States Geological Survey; Alexander T. Britton, a prominent Washington, D.C., land attorney and substantial investor in public land in Kansas; Col. Thomas Donaldson, another land attorney who had been the register of the Boise land office for six years; and Maj. John Wesley Powell, the first director of the United States Bureau of Ethnology of the Smithsonian Institution and famous for his exploration of the Grand Canyon. The commission’s report, submitted in 1880, REPORT TO THE PUBLIC LANDS COMMISSION CREATED BY THE ACT OF MARCH 3, 1879, RELATING TO PUBLIC LANDS IN THE WESTERN PORTION OF THE UNITED STATES AND TO THE OPERATION OF EXISTING LAND LAWS, H.R. EXEC. DOC. NO. 46, 46th Cong., 2d Sess. (1880), included comprehensive proposed
legislation relating to all aspects of the public land laws. In general, the commission’s proposals relating to mineral lands reflected concerns already expressed by Rossiter Raymond that extralateral rights would only foment litigation, that local mining district records were inadequate, and that a uniform system of locating claims on the ground be established. Nothing came of the recommendations at the national level, but the practical result was that within ten years, all the western mining states had enacted fairly consistent statewide procedures for staking and recording claims that eliminated many of the recordkeeping concerns of the commission. The commission’s concerns over the exercise of extralateral rights proved prophetic, however, as fierce legal battles soon began to take place throughout the western mining states and continued unabated until the 1920s.

The 1921 report was the result of the appointment of a committee by the director of the United States Bureau of Mines on January 23, 1917. The committee’s report was foreshadowed by a paper presented by Horace V. Winchell, chair of the mining law committee of the American Institute of Mining Engineers at its New York meeting in 1914. Winchell’s report, entitled “Why the Mining Laws Should be Revised,” dwelled at some length on areas that were supplanted by the Mineral Leasing Act passed in 1920, 41 Stat. 437, and expressed the industry view of changes needed in the mining law. In summary, the report suggested that extralateral rights be abolished, that actual discovery as a prerequisite to the location of a claim be discarded in place of a requirement of proof within five years after location and a patent application within seven years (although an extension to twelve years could be allowed). The size of claims was increased to forty acres with the right to stake claims by a single individual of up to 160 acres and all claims had to conform to the subdivisions of the public land survey system. These recommendations were included as legislation introduced in 1921 but the bill died in committee, attributed to, at least in part, the opposition of the grass roots miner.

Clear changes in the attitude of the federal administration toward the mining law began in the 1940s. In the 1942 annual report of the Secretary of the Interior, Fred W. Johnson, the commissioner of the General Land Office, urged the adoption of a leasing system for all minerals, coupled with a government-sponsored metalliferous minerals exploration program, the cost of which would presumably be recovered as a part of bonuses by prospective lessees. HAROLD L. ICKES, ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR 131-32 (1942). The next year Johnson, in a follow-up to these recommendations, suggested that these mineral “deposits are the property of all the people” and that the United States government represented the “proper administrative authority” to prevent “wasteful exploitation.” These recommendations came to naught, but did represent an undercurrent for change that continued to build within the Department of the Interior.

The eventual result of concern expressed both inside and outside the administration, along with the lack of a comprehensive “organic act” governing the functioning of the Bureau of Land Management, was the creation of the Public Land Law Review Commission. The commission was authorized in 1964, 78 Stat. 982, and represented the greatest investment of time and effort to date to provide this
nation with a comprehensive evaluation of its public land laws. The nineteen-member commission was chaired by Rep. Wayne N. Aspinall of Colorado and included six members each from the House and Senate and six presidential appointees. In addition, the Act established an advisory council consisting of federal liaison officers from the departments and agencies having an interest in the retention, management, or disposition of the public lands and twenty-five other members representing similarly interested major citizen groups.

The commission’s final report, published in 1970, contained a chapter devoted to mineral resources. The first sentences commented:

Our standard of living and our national defense are heavily dependent upon the availability of fuel and nonfuel minerals. National requirements for these products are an essential factor in the development of a rational policy for mineral development on our public lands. While it is apparent the mineral development is important to regional growth and other factors, we have given primary weight to the overriding national requirements.

A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION’S LAND 121 (1970). The report suggested that public lands minerals policy should encourage exploration, development, and production of minerals on the public lands and that this effort should have a preference over some or all other uses on much of the public lands. Lands that should be excluded were recognized as national parks and monuments and the government was urged to make mineral examinations to provide reliable information concerning potential mineralization on all of the public lands, including those areas where exploration had been excluded.

With regard to the mining law itself, the report pointed out its existing weaknesses related to the uncertainty of tenure prior to discovery, the uncertainty as to what constituted a discovery of “valuable mineral” for purposes of obtaining a patent, and inadequate provisions for the acquisition of land for surface facilities. The commission’s report recommended retention of the location-purchase system of mineral tenure through amendment of the General Mining Law based on their view that the traditional right of self-initiation of a claim was required to encourage, in contrast to merely permitting, mineral exploration of the public lands. A minority report filed by four members, however, reflected an internal debate within the commission and in a footnote suggested a leasing system. The system recommended by the commission was the creation of an initial exploration claim, fixed according to the public land survey system to avoid any question of its location. This initial exploration claim would give the claimant an exclusive right to explore for a maximum time to be fixed by Congress, during which time, upon making a discovery of valuable mineral, the claimant would have the right to a patent to the mineral estate together with a right to either purchase or lease the surface upon payment of market value. The commission also suggested that royalty should be collected on production both before and after patent based on rates being paid to other landowners for the same mineral ore in the region. These royalties, the
commission warned, should be modest and would not be a major source of revenue, but in any event should be fixed “at levels that will provide a continuing incentive for mineral exploration, development, and production on public lands.” Perhaps significantly, this issue provided the only tie vote within the committee’s deliberations — notably broken in favor of the royalty by Chair Aspinall — a fact lost on his critics who labeled him as an industry pawn.

Finally, the commission recommended a system of registration of claims with the government to eliminate long-dormant claims and provide the government with a records base for management. This last provision was the only lasting impact of the commission’s recommendations related to the mining law. The remaining recommendations quickly bogged down in an ideological dispute between those supporting the commission’s views, perceived to be favored by the mining industry, and those (represented by the Johnson administration) who favored a leasing system for all minerals. The focal point for leasing system proponents was Rep. Morris K. Udall of Arizona who, as a member of the commission, had opposed the commission’s recommendation for retention of the location-patent system, and later became chair of the House Interior and Insular Affairs Committee. In Udall’s individual case, his sponsorship of leasing proposals created political problems that forced him to abandon his push for a leasing bill (admitting frankly that he had not "seen the light," but instead had "felt the heat"). The focus turned, however, to an expansion of specially protected Wilderness Areas, with the clear intention being that if the mining law was not to be changed, the areas of its application would be limited.

The Current Battle Lines

The battle lines on proposals for reform of the mining law since the report of the Public Land Law Review Commission can be characterized as attempts by the mining industry to follow up on the commission’s recommendations (while at the same time attempting to mollify the independent mining sector that generally opposes any change that would increase the authority of federal management agencies) and those favoring the promulgation of a comprehensive, detailed regulatory statute containing mandatory requirements and providing for greater public participation (usually in the form of public hearings and authorizations for citizens suits). From a historical vantage point, the comprehensive legislative scheme reflects the traditional regalitarian approach while the industry position (and especially the independent mining sector) advocates the “free miner” concept that was the touchstone of the original mining law. The pressure for change, however (through the Wilderness Act of 1964, 78 Stat. 890, the Federal Land Policy and Management Act of 1976, 30 Stat. 2743, the California Desert Protection Act of 1994, 108 Stat. 4584, and other legislative programs), has gradually eroded the land base to which any mining law would apply. Also, beginning in 1993, the mining law was fundamentally altered by removing a requirement to perform annual assessment work and to substitute a claim maintenance fee. Opponents of the current mining law also were successful in enacting a moratorium on the issuance of new mineral patents at the conclusion of the 103rd Congress.
It seems clear that a new mining law is in the gestation stage, and the Republican control of the 104th Congress would suggest that, at least for the next two years, the likely shape of mining law legislation may look more like the 1970 recommendations of the Public Land Law Review Commission than the comprehensive, detailed regulatory statute that has been the hallmark of the proponents for change during the last twenty-five years. If the Republicans are true to their antigovernment rhetoric, the new Congress may return the “free miner” to a place of prominence in United States mineral law.
Instructions and Questions
For Continuing Education or Recertification Credits

This home study course has been designed to provide the reader with an understanding of the *The Historic Origins of the U.S. Mining Laws and Proposals for Change*. Upon satisfactory completion of the following questions as determined by the AAPL Director of Education, the Registered Land Professional (RLP) or Certified Professional Landman (CPL), as the case may be, will be:

1. awarded four RLP continuing education credits or four CPL recertification credits, or
2. notified he/she has not demonstrated an adequate understanding of the home study course materials.

If the RLP or CPL is notified of unsatisfactory completion of the following home study course questions, the AAPL Director of Education will request that the RLP or CPL answer additional questions concerning the home study course materials.

In order to receive the four continuing education or recertification credits, the RLP or CPL will be required to satisfactorily complete the home study course questions within one year to the day AAPL ships the home study course to the participant. This date will be postmarked on the envelope in which the home study course materials will be shipped to the course participant. Continuing education or recertification credits will only be awarded to a RLP or CPL who has purchased this home study course from the AAPL according to AAPL records.

On a separate sheet(s), please list each of the following six questions with your corresponding answers. Answer the questions as thoroughly as possible. If possible, please use a computer or a typewriter for this assignment. However, if that is not possible, please write or print legibly. When you have completed the questions and answers to your satisfaction, please forward them with a short cover letter to the AAPL Director of Education, c/o AAPL, 4100 Fossil Creek Boulevard, Fort Worth, Texas 76137-2791. This home study booklet is yours to keep.

Upon receipt of the materials you have forwarded, the AAPL Director of Education will review them and make a determination whether or not you have demonstrated an adequate understanding of the home study course. You should be notified of his decision within two weeks of AAPL’s receipt of your materials.
Questions

1. Discuss the two concepts by which mineral resources were historically acquired.

2. Briefly state the English Ancient Rights of Miners.

3. Briefly state the Spanish Colonial laws.

4. What was the quinto?

5. Discuss the origin and evolution of mining district regulations and the passage of the federal mining laws.

6. What is the current situation with regard to U.S. mining laws?